Supreme Court, U.S.
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No. 98-1774

IN THE
Supreme Court of the United States

BAILEY A. JONES,

Petitioner,

v.

CITY OF BERKELEY RENT STABILIZATION BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the legitimacy of a local ordinance under the Takings Clause determined without regard to the economic effect on the party invoking the clause?

LIST OF PARTIES

The Petition does not list the parties below. They were Bailey A. Jones, plaintiff and appellant; City of Berkeley Rent Stabilization Board, defendant and respondent; and D. Smith, A. White, A. Jones, C. Adala, K. Adala, K. Nunn, D. Kukua, C. Johnson, E. Esquivel, S. Mantz, J. Nichols, D. Edwards, T. Mack, T. Mathews, J. Brown, J. McDonald, E. Itzep-Castro, S. Portillo, J. Adanilson, P. Taquiej, R. Rilea, S. Trapp, J. Ferrigno, D. Bradley, S. Williams, J. Rogers, L. Harris, T. Okuyama, T. Wang, Q. Chen, F. Lee, V. Washington, M. Tesfamariam, E. Yihdego, and A. Davis, real parties in interest.

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STATEMENT OF THE CASE

The voters of the city of Berkeley, California adopted a Rent Stabilization and Eviction for Good Cause Ordinance (the "Ordinance") in June 1980, succeeding a series of short-term rent controls which had started on November 7, 1978. (Petitioner's Appendix – "PA" – at F-2.) Between December 1978 and July 1983 Petitioner Bailey A. Jones acquired 36 rental units in Berkeley, of which 18 were subject to rent control in June 1994. (Respondent's Appendix – "RA" – at 4a.)

In November 1994 (RA at 7a), Mr. Jones filed the action below, alleging that the Ordinance fails to substantially advance a legitimate state interest and is therefore invalid under the Takings Clause of the Fifth Amendment. (RA at 5a-6a, 8a.)

Petitioner alleges that in June 1994 the maximum rents allowed for each of his regulated units exceeded what he could in fact obtain for the units from tenants or prospective tenants. (RA at 4a-5a.) He does not allege that other owners were similarly situated. Because his rents were below the allowable maximums in 1994, Petitioner alleges that the Ordinance is "demonstrably irrelevant" to one of its stated purposes, preventing unwarranted rent increases.[1] (RA at 5a.) Petitioner also alleges that the Ordinance has reduced the amount of rental housing made available by other owners – apparently as a result of lowering their rents – and that this has caused low-income households, students and the elderly to live elsewhere, contrary to another of its stated purposes. (RA at 5a-6a.)

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1. This allegation does not extend to any of the Ordinance's other stated purposes. *Compare* PA at F-2, § 13.76.030.

The action below also asserts that the registration fee collected under the Ordinance is not proportional to "any harm that could result from the unregulated use of Mr. Jones' properties". (RA at 8a.) Petitioner's June 1994 annual registration fee (for all covered units) totaled $1,515. (RA at 6a.)

The California Court of Appeal determined that Petitioner had not alleged that he suffered any "appreciable economic injury". (PA at A-6.) It therefore concluded that he could not pursue a Takings Clause claim that the Ordinance did not substantially advance a legitimate state interest. (PA at A-13.) The Court of Appeal also determined that the registration fee which Petitioner paid, a standardized fee imposed ministerially on all owners of covered units, was not subject to the rough proportionality standard. (PA at A-9.)

REASONS FOR DENYING THE PETITION

The court below correctly barred Petitioner's action because he alleged no appreciable economic injury stemming from the alleged pernicious effect of the Ordinance. In addition, Petitioner's claim is time-barred, and Petitioner lacks standing to raise it in this Court because Petitioner is not one of those protected by his theory of relief. Finally, Petitioner's ultimate argument on the merits relies on judicial willingness to sit in judgment on the wisdom of policy, an enterprise on which the courts will not embark.

I.

PETITIONER ALLEGES NO ECONOMIC INJURY WHICH CAN SUSTAIN A TAKINGS CLAIM

American courts have long heeded Justice Holmes' warning that they do not sit to assess the wisdom or correct the mistakes of legislators. *See Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). The Takings Clause does not change this. While there is a place in takings analysis for the question of whether a challenged law substantially advances a legitimate state interest, that place presupposes a significant economic injury to a recognizable property interest.

A. The Takings Clause Does Not Come Into Play Without a Relevant Injury.

The Petition does not identify any case which relies on the Takings Clause to invalidate a statute or ordinance for failure to advance a legitimate interest, in the absence of a significant injury to a recognizable property interest of the party challenging the law. To grant relief here, this Court would have to direct the California courts to invoke the Takings Clause even where no such injury is alleged, a direction out of keeping with the underlying purpose of that clause and the fundamental principle of separation of powers evoked by Justice Holmes.

Petitioner's sole alleged economic injury is payment of an annual registration fee of approximately $1,500, covering 18 apartments. (RA at 6a, 8a.) Petitioner does not allege that paying this registration fee in any meaningful way disrupts Petitioner's investment-backed expectations

— a doubly unlikely event since the Petition covers property purchased after rent controls were instituted. (RA at 4a.) Nor does Petitioner allege any effect on the value of his property. Indeed, since Petitioner positively asserts that his rents are lower than the Ordinance permits, he essentially concedes that under the Ordinance his property retains its value. (RA at 4a-5a.)

The facts in this case stand in sharp contrast to those in existing authority. In *Agins v. Tiburon*, 447 U.S. 255 (1980), cited by Petitioner as the source of the Takings Clause requirement that a zoning law substantially advance a legitimate state interest, the plaintiff alleged a $2,000,000 loss in value of a five-acre parcel of undeveloped land. *See Agins v. Tiburon*, 598 P.2d 25, 27 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980). In *Nectow v. Cambridge*, 277 U.S. 183 (1928), cited by *Agins* as the source of this requirement, a special master found that no practical use could be made of the plaintiff's land under the challenged zoning. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), involved dedication of a classic real property interest, an easement. *Dolan v. City of Tigard*, 512 U.S. 374 (1994), involved dedication of land. Both *Nollan* and *Dolan* involved conditions prerequisite to development of property; the opportunity to develop is itself a significant aspect of property ownership. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235, 1999 U.S. LEXIS 3631 (U.S. May 24, 1999), a combination of city requirements rendered 37.6 acres of residentially zoned land undevelopable. In the rent control context, as for rate regulation in general, deprivation of a "fair return" has generally been the test for constitutional injury. *See, e.g.*, *Pennell v. San Jose*, 485 U.S. 1, 13 (1988) (upholding against substantive due process challenge a tenant hardship

provision as consistent with "ensuring at the same time that landlords are guaranteed a fair return on their investment").

In contrast, Petitioner does not allege that he is denied a fair return, or deprived of any other recognized property interest. He asserts only that he has paid the modest cost necessary to permit administration of the Ordinance (including its housing quality protections and eviction rules).[2] Levies to cover such costs, in the form of license and business taxes as well as "fees", are common to regulated professions and businesses ranging from real estate brokerage to construction contracting to law to horse racing. However imperfectly conceived or ineffective the resulting regulation, such fees and other levies have not given rise to takings claims. To suggest that they should do so trivializes the Takings Clause.

B. Routine Fees Do Not Give Rise to Takings Claims.

This Court and other federal courts have consistently held that the Takings Clause addresses injuries to property, not routine obligations to pay money to a government body. In *United States v. Sperry Corporation*, 493 U.S. 52 (1989), this Court held unanimously that Sperry had "not identified any of its property that was taken" when it was charged a user fee because it fell under the jurisdiction of the Iran-United States Claims Tribunal. *Id.* at 59. The Court did so even though Sperry had brought its claim, and secured it by attachment, before the tribunal came into existence and also, when establishment of the tribunal prevented it from pursuing its claim elsewhere, had settled the claim without

2. Petitioner has omitted the Ordinance sections touching on these points from Petitioner's Appendix. Because their terms are not involved in the Court's decision on the Petition, Respondent's Appendix also does not include them.

the participation or assistance of the tribunal. *Id.* at 56. The fee was 1-1/2% of $2.8 million or approximately $42,000. *Id.* at 56, 58. Without reaching any other Takings Clause issue, the Court held that assessment of a user fee to pay for the cost of government service was not a taking. The opinion distinguishes *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), as involving the appropriation of interest on interpleader accounts with no justification whatsoever other than the "bare transfer of private property to the county". *Sperry*, 493 U.S. at 62 n.8.

The Ninth Circuit reached a conclusion similar to *Sperry* in *Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997), holding that a county-wide fee for garbage collection, even if charged to residents who did not use county garbage service, could not be a taking within the meaning of the Takings Clause. 110 F.3d at 704.

Traditionally, Fifth Amendment property interests have been defined by reference to state law. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-19 (1987) (Rehnquist, J., dissenting). Here, the highest California court to consider the case did not identify any property interest under state law, but rather found that

> annual registration fees imposed under the Ordinance apply generally to *all* Berkeley property owners offering non-exempt residential units for rent, and are imposed ministerially rather than on an individual and discretionary basis. Moreover, Jones has not alleged that any exaction or restriction imposed on him by the Ordinance interferes with his use of his property.

(PA at A-9 (original emphasis).)

For reasons set forth in Justice Kennedy's concurrence in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998), the Court has "been careful not to lose sight of the importance of identifying the property allegedly taken, lest all governmental action be subjected to examination" under the Takings Clause. 118 S. Ct. at 2156 (Kennedy, J., concurring). If the Takings Clause were expanded so it could apply whenever a regulatory scheme has, as regulation usually does, some ancillary monetary effect on those who are regulated, it will open an unfortunate new chapter in Fifth Amendment jurisprudence. For example, may defendants object to court filing fees as takings because the right of action pleaded against them does not substantially advance a legitimate state interest? Did the nationwide 55-mile per hour speed limit give rise to a cause of action for doctors, construction workers or others who drove long distances to work in sparsely populated states (such as Nevada or Wyoming) if it reduced their hours of paying work without reducing accidents? The Takings Clause should not be applied, potentially changing the standard for reviewing a public policy, because the policy is administered through a standardized fee. Here, paying a fee certainly does not illuminate with concrete facts the allegation that the Ordinance is a taking.

Eastern Enterprises and *Webb's Fabulous Pharmacies, Inc.* do not suggest loosening the link between the Takings Clause and damage to recognizable property interests. Rather, the two cases are examples of a narrow group of cases in which government legislates a transfer of funds based solely on the public or private transferee's need, without any connection between the transferor and the need for the transfer. In those cases, the focus is on the payment itself, and whether the payers are the right parties to bear

the payments, not on whether the benefits which are financed substantially advance a legitimate state interest. Here, in contrast, the costs of regulation are logically borne by the affected industry. Petitioner does not allege that the Rent Board's formula for recovering its costs through regulatory fees imposes a disproportionate share of those costs on Petitioner or that the fees in the aggregate are excessive or were misappropriated.[3] Petitioner's concern is not with the amount or proportionality of the fee, but with the program which it supports.

C. Petitioner Cannot Pursue This Case Based on the Injuries of Others.

Lacking an actionable injury of his own, Petitioner cannot piggyback on the hypothetical injuries of a wholly different class of property owners on whom the Ordinance has the more typical effect of limiting rents. Ordinarily, one person may not attack a statute "on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960). No exception to this rule should be made here, where the effect on others is diametrically opposed to the alleged effect on Petitioner. Petitioner's essential argument for invalidating the Ordinance is that it has lowered rents so much that owners have reduced the available housing stock and driven out deserving tenants. (RA at 5a-6a.) This argument cannot apply to Petitioner, whose rents are allegedly unaffected.

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3. Though the action below did not proceed far enough to create a record on this point, Petitioner has been authorized to recover the lion's share of these fees from his tenants through annual general rent increases, calculated by the Rent Board to allow recovery of its fee increases.

Petitioner is profoundly mistaken in construing the holding below as resting on the conclusion that a Takings Clause plaintiff must show not only that a challenged enactment fails to substantially advance a legitimate state interest but also that the plaintiff has been deprived of substantially all use of or value of his property. The court below held no such thing. Rather, it rejected Petitioner's claim that "he can state a cause of action for a taking without alleging that his own property has suffered *any* appreciable economic injury at all." (PA at A-6 (emphasis added); *see also* PA at A-5, referring to "serious economic injury".) In contrast, to hold that an economic effect as inconsequential, as universal under the regulatory scheme, and as irrelevant to the underlying theory of injury as the one claimed here gives rise to a takings claim, would indeed be a dramatic change in the law.

II.

PETITIONER'S INVERSE CONDEMNATION CLAIMS ARE TIME BARRED

Petitioner's complaint below alleges a federal claim based directly on the Fifth Amendment. The opportunity to challenge the Ordinance on its face under the Fifth Amendment expired long before Petitioner filed the complaint below.

Because neither the Fifth Amendment nor other federal authority contains a statute of limitations for Petitioner's claim, reference is made to the analogous state statute. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). The California statute of limitations for a facial regulatory takings challenge is five years. *See Sandpiper Mobile*

Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623, 627 (Ct. App. 1992), *cert. denied*, 507 U.S. 1032 (1993); Cal. Civ. Proc. Code § 319 (West 1999). The ordinance which Petitioner challenges was adopted in 1980 (PA at F-1, § 13.76.010), based on predecessor ordinances adopted in November 1978 and November 1979 (PA at F-2, § 13.76.020 (D), (G), (H)). Petitioner acquired his properties between December 1978 and July 1983 and has owned them continuously since. (RA at 4a.) He has since been required to pay and has paid registration fees yearly. *Id.* Plainly, the statute has expired for a facial challenge.

Petitioner attempts to avoid this time bar by pleading an "as applied" claim. He bases his claim that the Ordinance does not substantially advance any legitimate governmental interests on facts subsequent to enactment of the Ordinance. (RA at 5a-6a, 8a.) However, these facts concern the Ordinance as a whole and are in no way particular to Petitioner. They do not convert this facial challenge into as an-applied one.

No authority permits a litigant to subject the general validity of legislative enactments to recurring and repetitive scrutiny as long as they remain in effect, based on their alleged effects from year to year. Pleading generic facts about the Ordinance should not convert this to an as-applied case or avoid the statute of limitations. Ruling on similar facts, the Ninth Circuit found that the statute of limitations applicable to facial claims barred allegations that another California rent control ordinance failed to substantially advance its purpose "as applied". That court noted that the alleged "as applied" effect was "not a particular application of the statute", but (as in this case) arose "from the existence of the statute itself." *Levald, Inc. v. City of Palm Desert*,

998 F.2d 680, 689 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994).

Even assuming, however, that Petitioner's challenge to the across-the-board effect of the Ordinance were an as-applied challenge, the facts he alleges occurred "between 1980 and 1990". (RA at 5a.) It is thus virtually certain from the face of the complaint that it remains untimely even on an as-applied theory. If any of the effects which Petitioner alleges occurred before November 10, 1989 — less than two months before the end of the alleged ten-year period from 1980 to 1990 — than the statute had expired before the initial complaint was filed. It is vanishingly unlikely that the Ordinance did not have the consequences which Petitioner alleges for more than nine years, then achieved an actionable effect in a matter of months at the end of 1989. Under California law, the statute of limitations begins to run when the facts giving rise to the cause of action accrue. *See* Cal. Civ. Proc. Code § 312 (West 1999). Here, though the record below is not developed,[4] the inference that a cause of action had accrued before November 10, 1989 is almost inescapable.

Finally, continuing payment of registration fees does not convert the complaint below into a cause of action accruing in 1994. From the face of the complaint, it appears that Petitioner has been paying registration fees continuously since at least 1983. (RA at 4a.) Any cause of action concerning the continuing provisions of the Ordinance that could have accrued as a result of paying

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4. In California, a statute of limitations defense may be presented as late as trial. *See Ventura County Employees' Retirement Ass'n v. Pope*, 151 Cal. Rptr. 695, 707 (Ct. App. 1978).

registration fees would have done so some eleven years or more before filing of the complaint, well beyond the statute of limitations. Allowing a continuing nuisance, or "rolling", statute of limitations under these circumstances would thoroughly defeat any time limitation on challenging a statute which continued in force; each day a would-be litigant was affected by the statute would give rise to a new cause of action. This is inconsistent with established California law. *See, e.g., Sandpiper Mobile Village v. City of Carpinteria*, 12 Cal. Rptr. 2d 623, 627 (Ct. App. 1992), *cert. denied*, 507 U.S. 1032 (1993).

III.

PETITIONER LACKS STANDING TO PURSUE THIS ACTION BEFORE THIS COURT.

Petitioner's challenge is based on an alleged injury which appears to be novel in the lengthening history of constitutional challenges to rent control. Typically, injury is alleged due to the loss of otherwise obtainable rents. *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 8 (1988), holding that the "probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain . . . , is a sufficient threat of actual injury to satisfy" standing requirements. Petitioner here, however, alleges that no rent of any unit which he owns is reduced by the Ordinance. (RA at 4a-5a.) Based on Petitioner's own allegations, he has not lost rental income due to the Ordinance and has no standing to challenge it.

Petitioner does allege that for the 36 rental units he owned, 18 of which had rents regulated by the Ordinance

at the time of his complaint,[5] he paid annual registration fees totaling $1,515. (RA at 4a, 6a.) However, his case that the Ordinance is invalid rests on the argument that rent control has reduced the availability of housing, thus driving low income households, college students and the elderly out of Berkeley. (RA at 5a-6a.) Petitioner does not, and could not plausibly, allege that landlords are withdrawing units from the rental market to avoid a registration fee of roughly $100 per unit per year. He does not allege that he has withdrawn units. This case thus rests on an argument that the Ordinance is invalid because it affects other landlords — whose rents presumably are reduced by rent control — in a way wholly different from the way it affects Petitioner. Petitioner cannot achieve standing vicariously based on an injury which others may suffer but he does not.

Petitioner's registration fees, although a modest expense and not one (for reasons explained in Section I above) which implicates the Taking Clause, may be sufficient "injury in fact" to allow this case to proceed before this Court under Article III. Payment of the registration fee does not, however, bring him within the "zone of interests" of the legal provision which forms the gravamen of his complaint. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886 (1990). Petitioner appears singularly ill-suited to advance the claims of the majority of landlords subject to the Ordinance, which in all likelihood would be based on allegations that it *does* affect their rents.

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5. As the complaint notes, the Ordinance does not regulate the rents of units during periods when they are rented to tenants holding certificates or vouchers under Section 8 of the United States Housing Act. (RA at 4a.)

That others might be able to allege injuries from the Ordinance in a way which might enable them to raise a claim under the Takings Clause does not avail Petitioner. *See Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 523-30 (1991) (holding that postal unions could not challenge a decision to allow competition with the U.S. Postal Service, because competition was generally restricted in order to protect the availability of postal service, not employees' jobs); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 702-04 (9th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997) (holding that the expense to households which did not use county garbage service of a universal, county-wide collection fee was not within the zone of interest protected under the Commerce Clause, which would have applied, if at all, to protect competitors in an adjacent state); *Cone Corp. v. Florida Dep't of Transp.*, 921 F.2d 1190, 1203-06, 1210 (11th Cir. 1991), *cert. denied*, 500 U.S. 942 (1991) (holding that general contractors did not have standing to challenge a requirement that they use minority subcontractors based on clerical and procedural burdens, absent evidence that they had been denied contracts).

With respect to claims based on alleged affects on other landlords, drastically different from the Ordinance's alleged effects on him, Petitioner cannot show "such a personal stake on the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination. . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962), cited in *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217-18 (1974). With respect to the claim that he should pay no registration fee because rent control does not (or did not in 1994) reduce his rents, Petitioner does not allege other landlords are similarly situated, and his own situation does not rise to a level of significance which should concern this Court.

IV.

REACHING THE UNDERLYING ISSUE WHICH PETITIONER PUTS FORWARD WOULD INAPPROPRIATELY INVOLVE THE COURTS IN MAKING A LEGISLATIVE DECISION.

Deciding whether a legislative enactment substantially advances a legitimate state interest, in the absence of any effects particular to the complaining litigant, would necessarily involve the courts in reassessing the very decisions for which legislatures are responsible. Moreover, these matters are localized and fact-intensive. This case involves the policy of a moderate-size California city, whose situation as the home of a large university located in the core of one of the country's most expensive housing markets renders its apartment rental situation unusual even among the handful of California cities which regulate apartment rents. Extensive conflicting evidence would surely be presented in any ensuing trial, including contested comparisons of housing and population statistics from arguably comparable cities. This Court may appropriately wonder what the judicial system can ultimately accomplish in this kind of case.

At this stage the Petition raises only the question of whether Petitioner has alleged an economic injury sufficient for him to invoke the Takings Clause. The answer to that question only matters, however, if it enables Petitioner to challenge the ultimate wisdom of the Ordinance. Petitioner cites no case which involves such legislative second guessing. This case will waste judicial resources at all levels unless the ultimate standard for reviewing legislation under the Takings Clause is to differ drastically from the standards which apply elsewhere.

Petitioner, for instance, relies on the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (RA at 7a-8a), a standard held inapposite to cases like this in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, No. 97-1235, 1999 U.S. LEXIS 3631, *29 (U.S. May 24, 1999). *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, __ U.S. __, 119 S. Ct. 168 (1998), also cited by Petitioner, required no weighing of evidence or policy. The *Richardson* court was able to determine that it was logically impossible for the challenged ordinance there, involving sales of condominiums in Honolulu, to advance to any degree its one stated purpose. 124 F.3d at 1165-66. The court distinguished the challenged law from "ordinary rent control ordinances", which were not subject to the same logic. *Id.* at 1164. *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), *cert. denied*, 493 U.S. 976 (1989), and *Manocherian v. Lennox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995), also involved laws notable for their severe effects on property owners, to an extent arguably equivalent to depriving the owners of possessory rights. Neither court held that these effects on owners could have been justified simply by stronger evidence of benefits to other members of the public.

In contrast, Petitioner's underlying case here turns not on allegations of drastic effects on identifiable owners but on the claim that Berkeley voters made a mistake when they adopted the Ordinance, and that they will not recognize the alleged fact that they are defeating their own purposes. The interchangeable allegations in this case and in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999), *cert. denied*, No. 98-1512, 1999 U.S. LEXIS 3468 (U.S. May 24, 1999), evidence a dissatisfaction with rent control

policies broader than the facts attaching to any property, any alleged injury or any particular ordinance. The courts are not the place to determine whether this dissatisfaction is justified.

CONCLUSION

The Takings Clause does not authorize courts to act as grand inquisitors of whether legislation substantially advances legitimate interests. Petitioner should not be authorized to invoke the Fifth Amendment independently of identifiable injury to particular property, as the Petition requests. To grant this authority would be particularly inadvisable here, where the challenged legislation is nearly 20 years old, and where the allegations of its failure turn on facts affecting other property owners, but not Petitioner. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND REFUND OF MONEY PAID DATED APRIL 3, 1995 AND FILED APRIL 4, 1995

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

No. 743567-6

BAILEY A. JONES,

Plaintiff,

v.

CITY OF BERKELEY RENT
STABILIZATION BOARD,

Defendant.

D. SMITH, A. WHITE, A. JONES, C. ADALA, K. ADALA, K. NUNN, D. KUKUA, C. JOHNSON, E. ESQUIVEL, S. MANTZ, J. NICHOLS, D. EDWARDS,

Appendix A

T. MACK, T. MATHEWS, J. BROWN, J. MCDONALD, E. ITZEP-CASTRO, S. PORTILLO, J. ADANILSON, P. TAQUIEJ, R. RILEA, S. TRAPP, J. FERRIGNO, D. BRADLEY, S. WILLIAMS, J. ROGERS, L. HARRIS, T. OKUYAMA, T. WANG, Q. CHEN, F. LEE, V. WASHINGTON, M. TESFAMARIAM, E. YIHDEGO, A. DAVIS, and DOES 1 through 99, inclusive,

Real Parties in Interest.

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND REFUND OF MONEY PAID

Plaintiff, Bailey A. Jones, seeks a declaration under Code of Civil Procedure § 1060 that defendant, City of Berkeley Rent Stabilization Board (Rent Board), may not levy annual registration fees on certain property owned by Mr. Jones in the City of Berkeley. Plaintiff further seeks a refund of said fees paid under protest. By this verified complaint plaintiff alleges as follows:

PARTIES

1. Plaintiff, Bailey A. Jones, is the record owner, jointly with his wife, of residential rental property located at 2328 7th Street, 2335 7th Street, 2436 8th Street, 1128 Bancroft Way, and 1130 Bancroft Way, all in the City of Berkeley (properties). The properties are subject to rent control under Berkeley Municipal Code Chapter 13.76, the "Rent Stabilization and Eviction for Good Cause Program" (Rent Control Law).

2. Defendant, City of Berkeley Rent Stabilization Board, is the administrative agency charged with administering the provisions of the Rent Control Law and ordinances adopted pursuant thereto.

3. Real parties in interest D. Smith, A. White, A. Jones, C. Adala, K. Adala, K. Nunn, D. Kukua, C. Johnson, E. Esquivel, S. Mantz, J. Nichols, D. Edwards, T. Mack, T. Mathews, J. Brown, J. McDonald, E. Itzep-Castro, S. Portillo, J. Adanilson, P. Taquiej, R. Rilea, S. Trapp, J. Ferrigno, D. Bradley, S. Williams, J. Rogers, L. Harris, T. Okuyama, T. Wang, Q. Chen, F. Lee, V. Washington, M. Tesfamariam, E. Yihdego, and A. Davis are residents of Mr. Jones' properties under the terms of the Rent Control Law.

4. Plaintiff is ignorant of the true names and capacities of real parties in interest designated herein as Does 1 through 99, inclusive, and therefore designates these parties by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

STATEMENT OF FACTS

5. The City of Berkeley has regulated the rental of private residential property within its jurisdiction continuously since the current Rent Control Law was enacted in 1980.

6. The stated purposes of the Rent Control Law, as set forth in Berkeley Municipal Code § 13.76.030, include the following: "[T]o protect tenants from unwarranted rent

increases" and to "advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged."

7. Plaintiff Bailey A. Jones purchased the properties at issue at various times between December, 1978, and July, 1983. He has owned and maintained the properties for residential rental use continuously since acquiring them.

8. City of Berkeley Ordinance No. 6008-NS-1990, enacted pursuant to the Rent Control Law, requires owners of residential dwelling units that are rented or are available to rent to register these units and pay annual registration fees to the Rent Board. Mr. Jones has been required to pay, and has paid, the subject fees on the properties each year said fees have been imposed on them.

9. On or about May 23, 1994, pursuant to Ordinance No. 6008-NS-1990, the Rent Board presented Mr. Jones with bills for 1994-95 registration fees. After corrections and modifications, the total amount found to be due was $1,515.

10. The 5 properties owned by Mr. Jones contain a total of 36 residential rental units. As of June, 1994, 18 of these units were exempt from rent control under Section 8 of the United States Housing Act, and 5 of the remaining 18 units were vacant.

11. For each and every one of the 13 dwelling units rented by Mr. Jones that were subject to the Rent Control Law as of June, 1994, the Rent Board had established

maximum allowable rents in excess of the amount Mr. Jones was actually receiving in rent.

12. With respect to the five vacant dwelling units Mr. Jones owns that were subject to the Rent Control Law as of June, 1994, Mr. Jones had diligently offered to rent each and every one of these units at the maximum allowable rents established by the Rent Board but was unable to rent any of these five units.

13. Because the maximum rents established by the Rent Board for Mr. Jones' properties were in excess of what he could charge for these units in an unregulated market, the Rent Control Law as applied is demonstrably irrelevant to its stated purpose of protecting renters from unwarranted rent increases.

14. Residents of the City of Berkeley were subjected to rent control continuously between 1980 and 1990. Over this decade, Berkeley's stock of rental housing units declined by more than 12%, while the rental housing supply *increased* in all comparable Northern California cities without rent control. Because of the reduced availability of affordable housing caused by rent control, the number of low-income and very low-income renter households living in Berkeley decreased by more than 2,000 between 1980 and 1990. Over this same period the number of college students living in Berkeley declined by more than 700, and the number of elderly persons living in Berkeley increased by less than 1%, a smaller increase than would be accounted for by the natural aging of the 1980 population. In all cases, these trends were sharply contrary to comparable Northern California cities without rent control.

15. Because rent control has reduced the availability of private rental housing in Berkeley, and has made it more difficult for students, the elderly, and low-income renters to find affordable rental housing in Berkeley, the Rent Control Law is not substantially advancing its stated purpose of advancing the housing policies of the city with regard to these population groups.

16. On June 27, 1994, plaintiff Bailey A. Jones paid the $1,515 in 1994-95 registration fees demanded by the Rent Board. In a letter of protest accompanying his payment, Mr. Jones objected to the 1994-95 registration fees on the grounds that, *inter alia*, the Rent Control Law as applied to his property was not substantially advancing any legitimate governmental interest.

17. On August 12, 1994, Mr. Jones presented to the City of Berkeley a claim for refund in the amount of $1,515, pursuant to Government Code § 905. In compliance with the form provided by the city for this purpose, the claim was presented to the Berkeley City Attorney.

18. By letter dated August 30, 1994, Deputy City Attorney Bruce A. Soublet returned Mr. Jones' claim unprocessed with instructions that it should be redirected to the Rent Board.

19. On September 6, 1994, Mr. Jones presented his claim for refund to the Rent Board. The Rent Board formally denied Mr. Jones' claim for a refund by letter dated September 12, 1994.

20. On November 10, 1994, Mr. Jones filed a Complaint for Declaratory Relief and Refund of Money Paid, naming as defendants both the City of Berkeley and the Rent Board. On March 29, 1995, the Alameda County Superior Court granted the city's general demurrer without leave to amend, and granted the Rent Board's special demurrer with leave to amend within ten days by deleting the challenge to the constitutionality of the Rent Control Law or by naming the residents of Mr. Jones' properties as real parties in interest.

FIRST CAUSE OF ACTION (DECLARATORY RELIEF)

21. Every allegation contained in Paragraphs 1 through 20 above is repeated and repled as if set forth in full.

22. The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897). A corresponding provision is included at Article I, Section 19, of the California Constitution.

23. To be constitutionally valid under the Takings Clause, the Rent Control Law must *substantially advance legitimate state interests*. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Moreover, the impact of fees or other burdens imposed by property regulations must be *roughly proportional* to social harms

that would otherwise be caused by the owner's use of his property. *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304, 320 (1994). The burden of proof is on the Rent Board to demonstrate that the Rent Control Law, as applied to Mr. Jones, meets these constitutional standards. *Dolan*, 129 L. Ed. 2d at 320 n.8.

24. The Rent Control Law does not substantially advance any legitimate governmental interest. The primary effect of Berkeley's rent control scheme has been to reduce the supply of affordable housing in Berkeley. The shortage of affordable housing created by rent control has disproportionately burdened the poor, the elderly, students, young families, and other especially vulnerable groups. Therefore, the application of the Rent Control Law to Mr. Jones is invalid as a regulatory taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution.

25. Requiring Mr. Jones to pay annual registration fees of $1,515 is not roughly proportional to any harm that could result from the unregulated use of Mr. Jones' properties. The Rent Board has established allowable maximum rents for the properties that exceed the amount for which these accommodations can be rented in the open market. In other words, the rent levels imposed under rent control are actually higher than the rents Mr. Jones could obtain in the absence of regulation. Imposing the subject fees therefore comprises a regulatory taking of Mr. Jones' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution.

Appendix A

26. The Rent Board's decision was final on September 12, 1994; Mr. Jones has exhausted his administrative remedies; this action is timely filed.

27. An actual controversy exists between the parties in that Mr. Jones believes the imposition of annual registration fees on his properties violates his constitutional rights, whereas defendant Rent Board believes the fees may be validly imposed.

28. Mr. Jones desires a judicial determination of the rights and duties of the parties, including a declaration regarding the validity of imposing annual registration fees on his properties.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION (REFUND)

29. Every allegation contained in Paragraphs 1 through 28 above is repeated and replied as if set forth in full.

30. Because the Rent Control Law is unconstitutional as applied to Mr. Jones' properties, the Rent Board erred in denying his claim for refund of $1,515 in 1994-95 registration fees, and Mr. Jones is lawfully entitled to a refund of said fees.

WHEREFORE, plaintiff prays for judgment as set forth below:

Appendix A

PRAYER

Based upon the allegations above, plaintiff prays for judgment against defendant City of Berkeley Rent Stabilization Board as follows:

1. for a declaration that the City of Berkeley's Rent Control Law is unconstitutional as applied to plaintiff Bailey A. Jones, and that Mr. Jones may not be required to pay registration fees to the Rent Board pursuant to the Rent Control Law;

2. for a refund of the $1,515 in 1994-95 registration fees Mr. Jones paid under protest, plus statutory interest;

3. for costs of suit including reasonable attorneys' fees; and

4. for such other or further relief as the Court deems just and proper.

DATED: April 3, 1995.

Respectfully submitted,

JAMES S. BURLING
R. S. RADFORD
DANIEL T. FITZPATRICK

By s/ R.S. Radford
R. S. RADFORD

Attorneys for Plaintiff